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NO. 86-1572

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RALPH KEMP, Warden,

Petitioner,

vs.

WILLIAM ANTHONY BROOKS,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, WILLIAM ANTHONY BROOKS, by and through his undersigned counsel, asks leave to file his Brief in Opposition to the Warden's Petition for Writ of Certiorari without prepayment of fees and costs, and to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court.

Respondent's Affidavit in support of this motion is attached hereto as "Exhibit A."

Respectfully submitted,

STEPHEN B. BRIGHT
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(404) 688-1202

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(404) 523-5398

Counsel for respondent
William Anthony Brooks

By Stephen B. Bright

No. 86-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM ANTHONY BROOKS,

Petitioner,

-v-

RALPH KEMP, Warden
Georgia Diagnostic and
Classification Center,

Respondent.

AFFIDAVIT OF POVERTY

I, WILLIAM ANTHONY BROOKS, declare that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor, and that I believe that I am entitled to relief.

1. Are you employed? Yes _____ No ✓

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. _____

   b. If the answer is "no," state the date of last employment, and the amount of salary and wages per month which you received. 1977 - $3.00/hr.

2. Have you received within the last twelve months any money from the following sources?

   a. Business, profession or form of self-employment? Yes___ No ✓
   b. Rent payments, interest, or dividends? Yes___ No ✓
   c. Pensions, annuities, or life insurance payments? Yes___ No ✓
   d. Gifts or inheritances? Yes___ No ✓
   e. Any other sources? Yes ✓ No___

3. Do you own any cash, or do you have any money in any checking or savings account?

Yes ✓ No _____ (Include any funds in prison account)
If the answer is "yes," state the total value of the items owned. About $5.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes _____ No ✓

If the answer is "yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute to their support. None

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

William V. Brooks

WILLIAM ANTHONY BROOKS

Sworn to and subscribed before me,

this the 27th day of May, 1987.

Harriet P. Morris
Notary Public

My Commission expires:

Notary Public, Fulton County, Georgia
My Commission Expires May 30, 1990

ORIGINAL

No. 86-1572

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RALPH KEMP, WARDEN,

Petitioner,

vs.

WILLIAM ANTHONY BROOKS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED

Whether this Court should grant plenary review to decide whether the Court of Appeals, after conducting a thorough review of the record, correctly applied the federal harmless error rule set out in Chapman v. California, 386 U.S. 18 (1967), and Rose v. Clark, 478 U.S. ___, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), in determining that an instruction which placed the burden on a criminal defendant to prove lack of malice was not harmless where his conviction for malice murder turned on whether the shooting of the victim was accidental or malicious and he stated that it was accidental in the only account of what actually happened.

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No. 86-1572

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RALPH KEMP, WARDEN,

Petitioner,

vs.

WILLIAM ANTHONY BROOKS,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

STATEMENT OF THE CASE

The respondent Warden seeks a petition for a writ of certiorari in this case for the purpose of obtaining review of the decision of the Court of Appeals below that the burden-shifting instruction in Mr. Brooks case was not harmless beyond a reasonable doubt under the standards set out in Chapman v. California, 386 U.S. 18 (1967), and Rose v. Clark, 478 U.S. ___, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986).

The Court of Appeals, sitting en banc, conducted two separate harmless error inquiries in this case and concluded each time that because the issue before the jury was whether the killing was malicious or accidental, the burden shifting instruction was not harmless. The Court first reached this conclusion applying the Chapman standard. Brooks v. Kemp, 762 F.2d 1383, 1390-94 (11th Cir. 1985) (en banc). This Court vacated the Court's decision and remanded for further consideration in light of Rose v. Clark. Kemp v. Brooks, ___ U.S. ___, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986). The Court of Appeals received supple-

mental briefing from the parties and once again concluded that the error was not harmless beyond a reasonable doubt. Brooks v. Kemp, 809 F.2d 700 (11th Cir. 1987) (en banc).

William Anthony Brooks is a black youth who was convicted of murder, armed robbery, kidnapping and rape, and sentenced to death by an all-white jury in Columbus, Georgia, a community that is 30 percent black, on November 15-18, 1977. He was also sentenced to a term of life imprisonment for both armed robbery and rape, and to a term of twenty years for kidnapping, all of the sentences to run consecutive to each other.

The decision of the Court of Appeals applies only to the murder charge. Mr. Brooks was not granted a new trial with regard to his other convictions. However, Mr. Brooks' guilt on the murder charge turned on whether the single gunshot wound to the victim's neck was the result of a malicious intent to kill or an accident. Two statements made by Mr. Brooks to the police were introduced at trial. According to one, Mr. Brooks said that he pointed a pistol at the victim and pulled the hammer back to make her stop screaming. He then told the police that the gun just "went off and hit her." Tr. 759. There was no other witness to the crime.

The trial court charged the jury that Mr. Brooks would not be guilty of murder with malice aforethought if the shooting was the result of "misfortune or accident". Tr. 828. On the other hand, the court charged the jury that Mr. Brooks would be guilty of murder if he acted with malice. The Court instructed:

> [t]he law, ladies and gentlemen, presumes every homicide to be malicious until the contrary appears from the circumstances of alleviation, excuse or justification, and it is incumbent upon the accused to make out such circumstances to your satisfaction unless they appear from the evidence produced against him.

Tr. 831. The Court of Appeals found that this instruction impermissibly shifted the burden of proof to Mr. Brooks on an essential element and was not harmless beyond a reasonable doubt.

REASONS FOR NOT GRANTING THE WRIT

I. BECAUSE THE COURT OF APPEALS CORRECTLY APPLIED THE HARMLESS ERROR STANDARD SET OUT IN THIS COURT'S CASES, THIS CASE PRESENTS NO QUESTION FOR PLENARY REVIEW BY THIS COURT.

The State, in its Petition for Writ of Certiorari, seeks plenary review from this Court of a purely factual issue having no impact upon any case but this one: whether the court of appeals below correctly applied the harmless error standard set out in Chapman v. California, 386 U.S. 18 (1967), and Rose v. Clark, 478 U.S. ___, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), to a clear violation of Sandstrom v. Montana, 442 U.S. 510 (1979). For the following reasons, this Court should decline the request of Petitioner and deny review.

The State's petition presents no conflict among state or federal courts, no important question of federal law which should be settled by this court, and no federal question that has been decided in a way in conflict with the applicable decision of this Court. Supreme Court Rule 17.1. This Court has already determined that burden-shifting instructions violate due process in Sandstrom, and that such violations may be harmless beyond a reasonable doubt in Rose v. Clark. This case involves nothing more than the application of those well established constitutional principles to the facts of Mr. Brooks' case.

The question of whether a constitutional violation is harmless in a given case "is a question more appropriately left to the courts below." Connecticut v. Johnson, 460 U.S. 73, 102 (1983)(Powell, J. dissenting). And where this Court decides to review such a finding by a lower court, the primary task "is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision." Francis v. Franklin, 471 U.S. 307, ___ n. 10, 105 S.Ct. 1965, 1977 n.10, 85 L.Ed.2d 344, ___ n. 10 (1985).

In this case, the finding that the Sandstrom error was not harmless was twice made by the en banc Court of Appeals for the Eleventh Circuit after careful review of the record facts and the

contentions of both parties. See, Brooks v. Kemp, 762 F.2d at 1390-1394, and Brooks v. Kemp, 809 F.2d at 700-701. The Court of Appeals analyzed the harmless error question at length and made clear the basis for its conclusion. The Court found that the issues of intent and malice were closely contested and, therefore, the burden-shifting charge on malice, an essential element of murder, was not harmless. Tr. 819.

The Court of Appeals found that the question of whether Mr. Brooks intended to kill the decedent "was clearly put in issue at trial." 762 F.2d at 1391. Indeed, "it was the only issue, in practical effect, subject to dispute with respect to the malice murder charge." 762 F.2d at 1393. The Court found that the only direct evidence as to how the shooting occurred, Mr. Brooks' statement to the Columbus police, indicated that the pistol he was carrying discharged accidentally. 762 F.2d at 1391.

The Court also reviewed the closing argument of the prosecution in which the state "explicitly referred to the accident defense, urging the jury to disbelieve it[.]" Id. Reviewing the instructions given the jury prior to its deliberations, the Court noted that the trial court had charged the jury that Mr. Brooks should be acquitted if it found that the shooting was accidental. Id, at 1392. In addition, the Court noted that the State had conceded in briefing before the Court that Mr. Brooks' defense to the murder charge was accident. Id.

Thus, the Court conducted a thorough review of all relevant factors, as required by Rose v. Clark, before deciding "whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." Rose v. Clark, 106 S.Ct. at 3109.

> . . . Because of the erroneous charge, however, we cannot determine whether the jury disbelieved Brooks, or whether it merely applied the erroneous presumption that every homicide is malicious. Brooks' statement was the only direct evidence as to whether the killing was accidental or malicious. The jury could reasonably have inferred that the killing was malicious . . . . However, it is of course possible to kidnap, rob, rape and

> even threaten without intending to kill. . . . Considering all the facts and circumstances, we cannot conclude "beyond a reasonable doubt that the [Sandstrom] error complained of did not contribute to the [murder] verdict obtained." Chapman, 386 U.S. at 24, 87 S.Ct. at 828.

762 F.2d at 1393-94 [footnotes omitted; brackets in original].

This is precisely the inquiry required by Rose v. Clark. Just as this Court did in Rose v. Clark, the Court of Appeals adopted Chapman v. California as its starting point, noting that the reviewing court must look at all the circumstances in the case. As required by this Court's decision in Clark, the Court focused its inquiry on intent, not indicia of general guilt. And as required by Clark, the Court of Appeals concluded its analysis by determining whether the evidence of intent was so dispositive that the jury would not have relied upon the defective instruction. It concluded that it was not.

Ignoring the foregoing, Warden Kemp's petition urges that accident and intent were even not issues before the jury. Petition for Certiorari at 16. However, as observed by the Court of Appeals, the Warden conceded both before the panel and the en banc Court that the issue of whether the shooting was committed with malice was very much an issue.

> [Brooks] admitted to the police that he raped the victim, but stated that he only put the gun to her head to scare her. He then stated that it just somehow went off. If the jury believed this portion of the statement by the Appellant, the the jury would be obligated under the charge of the court to find [Brooks] not guilty by virtue of a defense of accident or misfortune.

Warden's Brief before panel at 58; Warden's Brief before en banc Court at 30. Upon this record, and while carefully following this Court's decisions in Chapman and Rose, the Court of Appeals concluded that the defective charge put Mr. Brooks "in the position of having to disprove malice" which "as reflected by Brooks' statement to the police, . . . was the only issue, in practical effect, subject to dispute with respect to the malice murder charge". 762 F.2d at 1393.

As this Court's "primary task" in reviewing harmless error determination made by the lower courts is to "ensure that the court undertook a thorough inquiry and made clear the basis of its decision", Francis v. Franklin, 105 S.Ct. at 1977 n. 10, Warden Kemp's petition presents an issue wholly unworthy of plenary review. This Court should accordingly deny the petition.

CONCLUSION

For the foregoing reasons, this Court should deny Warden Kemp's petition to grant the writ of certiorari.

This the 28th day of May, 1987.

Respectfully submitted,

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Counsel for Respondent
William Anthony Brooks

By Stephen B. Bright

CERTIFICATE OF SERVICE

I, Stephen B. Bright, a member of the Bar of this Court, certify that a copy of the foregoing Brief in Opposition was served by first class mail this 28th day of May, 1987, upon counsel for the petitioner, Assistant Attorney General Mary Beth Westmoreland, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA., 30334, at the foregoing address.

Stephen B. Bright